

THE HONORABLE SHARON L. GLEASON

Law Office of Suzanne Lee Elliott  
Suite 1300 Hoge  
705 Second Ave.  
Seattle WA 98104  
[Suzanne-elliott@msn.com](mailto:Suzanne-elliott@msn.com)  
206-623-0291

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN PEARL SMITH, II,  
Defendant.

No. 16-00086

MOTION TO PROHIBIT THE  
ANCHORAGE CORRECTIONAL  
COMPLEX FROM VIDEOTAPING  
CONFIDENTIAL ATTORNEY CLIENT  
AND DEFENSE TEAM VISITS WITH  
THE CLIENT

**I. MOTION**

Comes now the defendant John Pearl Smith, II and moves to immediately prohibit the videotape or audiotaping of defense team meetings between John Pearl Smith, II and any members of the defense team during visits at the Anchorage Correctional Complex.

**II. GROUNDS FOR THIS REQUEST**

On information and belief, based upon the docket in *United States v. Kit Kjarala*, 18 CR 00072 and other public information, the defense believes that that Anchorage Correctional Complex West has been videotaping - and perhaps audiotaping - meetings between John Pearl Smith, II and members of his defense team. Smith is seeking additional

MOTION TO PROHIBIT AUDIO AND  
VIDEOTAPING BETWEEN SMITH AND HIS  
DEFENSE TEAM - 1

LAW OFFICE OF SUZANNE LEE ELLIOTT  
1300 Hoge Building  
705 Second Avenue  
Seattle, Washington 98104-1705  
(206) 623-0291  
FAX (206) 623-2086

1 discovery regarding these matters. However, because counsel has some information that  
2 audiotaping did occur during attorney client visits in 2016 and some information that the  
3 videotaping continues<sup>1</sup>, and because his defense team must continue to meet with Mr.  
4 Smith, he asks for an immediate order prohibiting any video or audiotaping of visits (to  
5 the extent that is occurring) between Smith and any member of his defense team including  
6 investigators, mitigation specialists and other professionals. Smith may bring further  
7 motions once further discovery is completed.

8 Smith was arrested on June 22, 2016 and jailed at the Anchorage Correctional  
9 Complex West. He was arraigned, and counsel was appointed on June 29, 2016. Second  
10 counsel was appointed in September 2016. Counsel, investigators and other members of  
11 the defense team have been meeting with Smith the Anchorage Correctional Complex  
12 West ever since June 2016.

13 Counsel has reasonable, reliable information to believe that up until at least  
14 November 1, 2016, the Anchorage Correctional Complex West had the ability to - and did  
15 - audio record meetings between counsel and clients in at least one visiting room in the jail.  
16 Counsel also has reasonable, reliable information that at all times since Mr. Smith has been  
17 incarcerated, the Anchorage Correctional Complex West has videotaped some or all of his  
18 visits with his defense team.

19 A defendant's unfettered and private ability to consult with counsel is essential to  
20 secure the fundamental right to due process and the protections of the Sixth Amendment.  
21 *Strickland v. Washington*, 466 668, 684-85. See also, *Mangiaracina v. Penzone*, 849 F.3d  
22 1191, 1198 (9th Cir. 2017). Conferences between counsel and the defendant are within the  
23

---

24 <sup>1</sup> Current Alaska DOC policy states only that the institution may not monitor conversations between an  
25 attorney and client "without a prior court order." Policy 808.01.VII(3)(b).

1 scope of the attorney-client privilege, the oldest of the privileges for confidential  
2 communications known to the common law. *Upjohn Co. v. United States*, 449 U.S. 383,  
3 389 (1981). The attorney-client privilege extends to confidential disclosures by a client to  
4 an attorney made in order to obtain legal assistance. *Fisher v. United States*, 425 U.S. 391,  
5 402 (1976). It also extends to “at least those attorneys to client communications which  
6 would have tendency to reveal the confidences of the client.” *In re Grand Jury*  
7 *Proceedings*, 616 F. 3rd 1172, 1182) (10th Cir. 2010).

8 Any conduct by the Government in eavesdropping upon the private consultations  
9 between the defendant and his attorney would deprive him of its right to effective counsel,  
10 *State v. Cory*, 62 Wash. 2d 371, 378, 382 P.2d 1019, 1023 (1963).

11 The same is true with visual monitoring. In *Case v. Andrews*, 226 Kan. 786 (Kan.  
12 1979), the Kansas Supreme Court held that the Lyon County jail policy of visually  
13 monitoring all consultations between attorneys and clients is an unreasonable interference  
14 with the right to confidential attorney-client communications. The confidentiality of  
15 communications between an attorney and his client should be carefully protected by the  
16 courts. *Id.* at 790. Because “absent a showing of any risk to the order or security of the jail,  
17 the practice of visually monitoring an attorney-client conference when privacy is  
18 requested, is unreasonable. Such unreasonable interference violates an accused’s Sixth  
19 Amendment right to effective representation by counsel.” *Id.* at 791. See also *State v.*  
20 *Walker*, 804 N.W.2d 284, 295 (Iowa 2011) (“in the absence of any individualized showing  
21 of a safety or security risk video surveillance violates an arrestee’s right to ‘see and consult  
22 confidentially’ with his attorney ‘alone and in private.’”); *People v. Dehmer*, 931 P.2d 460,  
23 463 (Colo.App. 1996)(finding the prison’s policy of videotaping attorney-client  
24 conferences was unlawful); *State v. Sherwood*, 174 Vt. 27, 800 A.2d 463, 466 (2002)

25  
MOTION TO PROHIBIT AUDIO AND  
VIDEOTAPING BETWEEN SMITH AND HIS  
DEFENSE TEAM - 3

LAW OFFICE OF SUZANNE LEE ELLIOTT  
1300 Hoge Building  
705 Second Avenue  
Seattle, Washington 98104-1705  
(206) 623-0291  
FAX (206) 623-2086

1 (“The tape itself is evidence that defendant's conversation with counsel was not, in fact,  
2 private.”).<sup>2</sup>

#### 3 IV. CONCLUSION

4 Based upon the above, the defendant respectfully requests that this Court to order  
5 the Anchorage Correctional Complex West to immediately cease any audio or videotaping  
6 of defense team visits with Mr. Smith.

7 DATED this 6th day of December 2018.

8 /s/Suzanne Lee Elliott

9 Law Office of Suzanne Lee Elliott  
10 1300 Hoge Building  
11 705 Second Avenue  
12 Seattle, Washington 98104  
13 Phone (206) 623-0291  
14 Fax (206) 623-2186  
15 Email: Suzanne-elliott@msn.com

16 /s/Steven Wells

17 Attorney at law  
18 431 West 7<sup>th</sup> Ave.  
19 Suite 107  
20 Anchorage, AK 99501

21 /s/Mark Larranaga

22 Walsh and Larranaga  
23 705 Second Ave.  
24 Suite 501  
25 Seattle WA 98104

#### 26 CERTIFICATE OF SERVICE

27  
28 <sup>2</sup> A recent law review article summarizes the law and issues surrounding improper intrusions into the  
29 attorney-client relationship in the prison setting, including litigation concerning this issue in *United States v.*  
30 *Black*, 2:16-cr-20032-JAR, Kansas. Peter A. Joy & Kevin C. McMunigal, *When Does Monitoring*  
31 *Defendants and Their Lawyers Cross the Line?*, Crim. Just., Winter 2017, at 46.

32 MOTION TO PROHIBIT AUDIO AND  
33 VIDEOTAPING BETWEEN SMITH AND HIS  
34 DEFENSE TEAM - 4

LAW OFFICE OF SUZANNE LEE ELLIOTT  
1300 Hoge Building  
705 Second Avenue  
Seattle, Washington 98104-1705  
(206) 623-0291  
FAX (206) 623-2186

1 I, SUZANNE LEE ELLIOTT, certify that on December 6th, 2018, I filed the  
2 foregoing document with the United States District Court's Electronic Case Filing  
3 (CM/ECF) system, which will serve one copy by email on Assistant United States  
4 Attorneys FRANK V. RUSSO, WILLIAM A. TAYLOR, JAMES NELSON AND  
5 KAREN VANDERGAW.

6  
7 /s/ Suzanne Lee Elliott  
8 Law Office of Suzanne Lee Elliott  
9 1300 Hoge Building  
10 705 Second Avenue  
11 Seattle, Washington 98104  
12 Phone: (206) 623-0291  
13 Fax: (206) 623-2186  
14 Email: suzanne-elliott@msn.com  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

MOTION TO PROHIBIT AUDIO AND  
VIDEOTAPING BETWEEN SMITH AND HIS  
DEFENSE TEAM - 5

LAW OFFICE OF SUZANNE LEE ELLIOTT  
1300 Hoge Building  
705 Second Avenue  
Seattle, Washington 98104-1705  
(206) 623-0291  
FAX (206) 623-2186